Hi-Summit Construction Sdn Bhd v Konsortium Lapangan Terjaya Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1124 OF 2011
MOHD HISHAMUDIN, ALIZATUL KHAIR AND ANANTHAM KASINATHER JJCA
24 JULY 2014

Civil Procedure — Appeal — Striking out — Preliminary objection — Claim for shares of equity in company in High Court — Allegation of unlawful transfer of shares — Seven applications fixed for hearing but counsel raised preliminary objection without advanced notice — Majority shareholder who was not party not interested in pursuing writ action — Refusal of court to refused to order stay of proceedings — Whether bad in law

This was an appeal against the decision of the High Court in striking out the appellant's action following a preliminary objection by the respondents. The appellant's claim in the High Court against the respondents was for, inter alia, 19% of shares or equity in the first respondent company, a joint venture company, who had a valuable highway concession worth RM1.7 billion. It was alleged that the respondents had unlawfully transferred the appellant's shares in the first respondent company to the second respondent company. Seven interlocutory applications were fixed for hearing before the High Court but before any of the applications could be heard, the counsel for the first, second and third respondents, orally and without advanced notice, raised a preliminary objection while the fourth respondent was absent. When the seven applications were called up, one Ms Lim, who was not a party, without prior notice to the appellant or the appellant's solicitors, appeared before the court with her counsel ('Mr David'). Mr David Mathews informed the court that Ms Lim was the beneficial majority shareholder of the appellant company and that she was not interested in pursuing the appellant's writ action. The appellant was unable to produce any resolution of the board of directors of the appellant company authorising his firm, Messrs Lawrence, to act for the appellant in the action. The appellant submitted that the firm of Messrs Lawrence had the authority to act by virtue of a warrant to act which was signed by the majority of the directors. The appellant further submitted that, in any event, even if the court were to find the warrant to act insufficient, the court should stay the proceedings and should direct the respondents to make a formal application by way of summons or motion to challenge Messrs Lawrence's authority to act for the appellant. The High Court refused to order a stay of the proceedings and to order the respondents to file a formal application to challenge Messrs Lawrence's authority to act. Instead, Her Ladyship upheld the

preliminary objection and summarily struck off the appellant's writ action on the ground that the warrant to act was insufficient without being accompanied by the appellant's board of directors' resolution appointing Messrs Lawrence to act; and the warrant to act, in any case, was bad in law as it was contrary to the wishes of Ms Lim who had no desire in pursuing the writ action.

Held, allowing the appeal with costs:

(1) The authenticity of the warrant to act produced by the appellant before the High Court judge was not disputed; nor was it disputed that there were only three directors in the appellant's board of directors, and that the warrant to act was signed by the majority of the directors. There was also no advanced notice issued to the appellant prior to the hearing that the respondents were going to make an oral challenge as to the appellant's solicitors' authority to act. It was, however, true that two of the respondents' solicitors had, prior to the hearing date, written to the appellant's solicitors but the letters were not notices of an intention to challenge Messrs Lawrence's authority to act (see para 24).

(2) There was no proper formal application made by the respondents before the High Court to challenge the authority of the appellant's solicitors to act; there was merely an oral challenge by the respondents' respective counsel made from the bar. Considering the manner in which the challenge was made, and in the light of the undisputed facts, the production of the warrant to act by the appellant's counsel was sufficient answer to the challenge; and that the respondents had no right to insist that the warrant to act be accompanied by a board of directors' resolution (see para 24).

(3) The parties orally challenging the appellant's solicitors' authority to act, namely, the respondents, had failed to show 'sufficient or admitted evidence' that there was no action properly before the High Court. On the contrary, the appellant's counsel was able to show that it had the warrant to act (see para 26).

(4) The High Court judge was wrong in law in striking out the appellant's writ action even if she were of the opinion that the warrant to act was insufficient to clothe the appellant's solicitors with the requisite authority since it was not accompanied by a board of directors' resolution. Had the High Court judge acted as Her Ladyship should, that is, to stay the proceedings and to direct the respondents to make a formal application (by motion or summons) to challenge the appellant's solicitors' authority to act, the appellant would have had the opportunity to obtain the board of directors' unanimous resolution ratifying the warrant to act (see paras 27–28).

(5) In the light of the existence of the warrant to act and the board of director's unanimous resolution, the hue and cry raised by the respondents before the High Court judge was nothing but a mere storm in a tea cup. It was hasty, harsh and unjust for the High Court judge to have struck off the appellant's suit summarily merely on an oral challenge from the Bar and without giving the appellant company and its solicitors the opportunity to prove in a proper formal application by the respondents that it's solicitors had the requisite authority to act (see para 29).

(6) A challenge to authority to act, as a rule, should be made only by way of a formal application (by summons or motion), and not to be made orally from the Bar. Any challenge to authority to act may be made orally from the Bar only in exceptional circumstances; and even then, the court should be extremely slow to entertain such an oral challenge. The court should only entertain an oral challenge made from the Bar where there is before the court evidence of a clear and unequivocal admission on the part of the solicitors that they have no authority to act for the party that they purport to act, or where, it is plain and obvious from the evidence before the court that the solicitors had no authority to act for a party (see para 30).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam membatalkan tindakan perayu berikutan bantahan awal oleh responden-responden. Tuntutan perayu di Mahkamah Tinggi terhadap responden-responden adalah untuk, antara lain, 19% saham atau ekuiti dalam syarikat responden pertama, satu syarikat usaha sama, yang mempunyai konsesi lebuh raya bernilai sejumlah RM1.7 billion. Adalah didakwa bahawa responden-responden telah secara tidak sah memindah saham perayu dalam syarikat responden pertama kepada syarikat responden kedua. Tujuh permohonan interlokutori telah ditetapkan untuk perbicaraan di hadapan Mahkamah Tinggi tetapi sebelum mana-mana permohonan dapat didengar, peguam bagi pihak responden-responden pertama, kedua dan ketiga, secara lisan dan tanpa notis terdahulu, telah menimbulkan bantahan awal manakala responden keempat tidak hadir. Apabila ketujuh-tujuh permohonan dipanggil, Cik Lim, yang bukan seorang pihak, tanpa notis terdahulu kepada perayu atau peguam perayu, telah hadir di hadapan mahkamah dengan peguamnya ('Encik David'). Encik David Mathews telah memberitahu mahkamah bahawa Cik Lim adalah pemegang saham majoriti benefisial syarikat perayu dan bahawa dia tidak berminat untuk meneruskan writ tindakan perayu. Perayu tidak dapat mengemukakan apa-apa resolusi lembaga pengarah syarikat perayu yang memberi kuasa firmanya, Tetuan Lawrence, untuk bertindak bagi pihak perayu dalam tindakan itu. Perayu berhujah bahawa firma Tetuan Lawrence mempunyai kuasa untuk bertindak menurut waran untuk bertindak yang

telah ditandatangani oleh majoriti daripada pengarah-pengarah. Perayu selanjutnya berhujah bahawa, dalam apa keadaan, jika mahkamah mendapati waran untuk bertindak itu tidak mencukupi, mahkamah hendaklah menggantung prosiding itu dan hendaklah mengarah responden-responden membuat permohonan formal melalui saman atau usul untuk mencabar kuasa Tetuan Lawrence untuk bertindak bagi pihak perayu. Mahkamah Tinggi enggan untuk memerintahkan penggantungan prosiding dan untuk memerintahkan responden-responden bagi memfailkan permohonan formal untuk mencabar kuasa untuk bertindak oleh Tetuan Lawrence. Sebaliknya, Yang Arif telah mengekalkan bantahan awal itu dan secara terus membatalkan writ tindakan perayu atas alasan bahawa waran untuk bertindak itu tidak mencukupi tanpa disertakan dengan resolusi lembaga pengarah perayu melantik Tetuan Lawrence untuk bertindak; dan waran untuk bertindak itu, dalam apa keadaan, adalah tidak baik dari segi undang-undang kerana bertentangan dengan hasrat Cik Lim yang tidak mempunyai niat untuk meneruskan writ tindakan itu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Keaslian waran untuk bertindak yang dikemukakan oleh perayu di hadapan hakim Mahkamah Tinggi tidak dipertikaikan; dan ia juga tidak dipertikaikan bahawa hanya terdapat tiga pengarah dalam lembaga pengarah perayu, dan bahawa waran untuk bertindak itu telah ditandatangani oleh majoriti pengarah-pengarah. Tiada juga notis terdahulu yang dikeluarkan kepada perayu sebelum perbicaraan itu bahawa responden-responden akan mengemukakan cabaran secara lisan berhubung kuasa peguamcara perayu untuk bertindak. Ia adalah, bagaimanapun, benar bahawa dua daripada peguamcara responden-responden telah, sebelum tarikh perbicaraan, menulis kepada peguamcara perayu tetapi surat-surat itu bukan notis-notis tentang niat untuk mencabar kuasa untuk bertindak oleh Tetuan Lawrence (lihat perenggan 24).

(2) Tiada permohonan formal yang dibuat oleh responden-responden di hadapan Mahkamah Tinggi untuk mencabar kuasa peguamcara perayu untuk bertindak; hanya terdapat cabaran secara lisan oleh peguam responden-responden masing-masingnya yang telah dibuat dari badan peguam. Dengan mengambil kira cara cabaran itu dibuat, dan berdasarkan fakta yang tidak dipertikaikan, waran untuk bertindak yang dikemukakan oleh peguam perayu adalah mencukupi untuk menjawab cabaran itu; dan bahawa responden-responden tiada hak untuk mendesak bahawa waran untuk bertindak itu disertakan dengan resolusi lembaga pengarah (lihat perenggan 24).

(3) Pihak-pihak secara lisan yang mencabar kuasa untuk bertindak peguam perayu, iaitu, responden-responden, telah gagal untuk menunjukkan

'sufficient or admitted evidence' bahawa tidak terdapat tindakan sewajarnya di hadapan Mahkamah Tinggi. Sebaliknya, peguam perayu dapat menunjukkan bahawa ia mempunyai waran untuk bertindak (lihat perenggan 26).

(4) Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang apabila membatalkan writ tindakan peryau meskipun beliau berpendapat bahawa waran untuk bertindak itu tidak mencukupi untuk memberikan peguamcara perayu dengan kuasa yang diperlukan oleh kerana ia tidak disertai dengan resolusi lembaga pengarah. Jika hakim Mahkamah Tinggi bertindak sebagaimana Yang Arif sepatutnya, iaitu, untuk menggantung prosiding itu dan untuk mengarah responden-responden membuat permohonan formal (melalui usul atau sama) bagi mencabar kuasa peguamcara perayu untuk bertindak, perayu mempunyai peluang memperolehi resolusi sebulat suara lembaga pengarah bagi meratifikasi waran untuk bertindak tersebut (lihat perenggan 27–28).

(5) Berdasarkan kewujudan waran untuk bertindak itu dan resolusi sebulat suara lembaga pengarah, kekecohan yang ditimbulkan oleh responden-responden di hadapan hakim Mahkamah Tinggi tidak lebih daripada bunyi guruh tanpa ribut. Ia adalah tergesa-gesa, kejam dan tidak adil untuk hakim Mahkamah Tinggi membatalkan guaman perayu secara terus hanya atas cabaran secara lisan dari Badan Peguam dan tanpa memberikan syarikat perayu dan peguamcaranya peluang untuk membuktikan dalam permohonan formal yang teratur oleh responden-responden bahawa peguamcaranya mempunyai kuasa yang diperlukan untuk bertindak (lihat perenggan 29).

(6) Cabaran terhadap kuasa untuk bertindak, sebagai suatu rukun, patut dibuat hanya melalui permohonan formal (melalui saman atau usul), dan tidak dibuat secara lisan dari Badan Peguam. Apa-apa cabaran terhadap kuasa untuk bertindak boleh dibuat secara lisan dari Badan Peguam hanya dalam keadaan tertentu; dan itu pun, mahkamah patut tidak melayan cabaran lisan sebegitu. Mahkamah hendaklah hanya melayan cabaran lisan yang dibuat dari Badan Peguam di mana terdapat di hadapan mahkamah keterangan pengakuan yang jelas dan tidak diragui di pihak peguamcara bahawa mereka tidak mempunyai kuasa untuk bertindak untuk pihak yang mereka bermaksud untuk bertindak, atau di mana, ia adalah jelas dan nyata berdasarkan keterangan di hadapan mahkamah bahawa peguamcara itu tidak mempunyai kuasa untuk bertindak bagi suatu pihak (lihat perenggan 30).]

Notes

For cases on striking out, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1801–1816.

Cases referred to

Howard Smith Ltd v Ampol Petroleum Ltd and Others (1974) 3 ALR 448, PC (refd)
William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1991] 2 MLJ 555, SC (refd)
Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240, FC (refd)
Yukilon Manufacturing Sdn Bhd & Anor v Dato Wong Gek Meng & Ors [1997] 2 MLJ 212, HC (folld)

Legislation referred to

Companies Act 1965 s 163(4)

Appeal from: Civil Suit No D3–22–1958 of 2003 (High Court, Kuala Lumpur)

Su Tiang Joo (Teh Eng Lay, Ong Ing How and R Jayasingam with him) (BH Lawrence & Co) for the appellant.
Ang Hean Leng (Yong Shih Han with him) (Lee Hishamuddin Allen & Gledhill) for the first respondent.
Loh Siew Cheang (Yap Mong Jay and Tan Jee Tjun with him) (Thomas Philip) for the second respondent.
VL Yiew (CH Yeoh & Yiew) for the third respondent.
Fourth respondent absent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This appeal is against the decision of 12 April 2011 of the High Court of Kuala Lumpur striking out the appellant's action following a preliminary objection by the respondents.

[2] At the High Court, the appellant (Hi-Summit Construction Sdn Bhd) was the plaintiff, whilst the first, second, third and fourth respondents were the first, second, third and fourth defendants, respectively.

[3] The appellant's claim in the High Court against the respondents is for, among others, 19% of shares or equity in the first respondent company (Konsortium Lapangan Terjaya Sdn Bhd), a joint venture company, who had a valuable highway concession worth RM1.7 billion (a federal government highway project known as 'Maju Expressway'). It is alleged that the respondents had unlawfully transferred the appellant's shares in the first respondent company to the second respondent company ('Ulimas Sdn Bhd').

[4] The appellant filed its writ of summons on 9 December 2003. For the purpose of this appeal, the merits of the appellant's claim are not in issue.

[5] On 12 April 2011, seven interlocutory applications were fixed for hearing before the learned High Court Judge of Kuala Lumpur. However, before any of the applications could be heard, the counsel for the first, second and third respondents (Dato' RR Sethu for the first respondent; Ms Lavinia Kumaraendran for the second respondent; and Mr VL Liew for the third respondent), orally and without advanced notice, raised a preliminary objection ('the respondents').

[6] The fourth respondent, Anson Perdana Bhd, was absent at the hearing of 12 April 2011 before the High Court, and was also absent at the hearing of this appeal.

[7] The respondents' preliminary objection was in regard to the authority to act on the part of the appellant's solicitors, Messrs BH Lawrence & Co ('Messrs Lawrence').

[8] But, there was something else that also transpired before the court on 12 April 2011 when the seven applications were called up. One Ms Lim Chew Yin, without prior notice to the appellant or the appellant's solicitors, appeared before the court with her counsel, Mr David Mathews. Ms Lim was not a party to the suit or to any of those applications that were before the High Court. Nonetheless, her counsel, Mr David Mathews, took the liberty to seek permission to address the court and to inform the court that she was the beneficial majority shareholder of the appellant company and that she was not interested in pursuing the appellant's writ action. It is not disputed that Ms Lim was a beneficial majority shareholder under a trust in respect of the shares.

[9] Learned counsel for the appellant, Mr Jayasingam, was, however, unable to produce before the High Court any resolution of the board of directors of the appellant company authorising his firm, Messrs Lawrence, to act for the appellant in the action.

[10] Mr Jayasingam, nonetheless, submitted before the learned High Court judge that the firm of Messrs Lawrence had the authority to act by virtue of a warrant to act dated 3 December 2003. The warrant to act was signed by two of the three directors of the appellant company. In other words, the warrant to act was signed by the majority of the directors. The two directors who signed the warrant to act are one Dato' Suhaimi bin Ibrahim and one Irwan Shah bin Abdullah. The third and only director that did not sign the warrant to act was one Abdul Rahmat bin Ramli.

[11] Mr Jayasingam further submitted that, in any event, even if the court were to find the warrant to act insufficient, the court should stay the proceedings and should direct the respondents to make a formal application by

way of summons or motion to challenge Messrs Lawrence's authority to act for the appellant. A

[12] The learned High Court judge, however, refused to order a stay of the proceedings and to order the respondents to file a formal application to challenge Messrs Lawrence's authority to act. Instead, she upheld the preliminary objection and summarily struck off the appellant's writ action. The relevant parts of the learned High Court judge's grounds of judgment read as follows: B

> [11] Once a challenge has been properly advanced, the burden of proving that the suit had been instituted with proper authority must rest on the first plaintiff. The first plaintiff proceeded to do just that by relying on the warrant to act dated 3 December 2003 and signed by the second and third plaintiffs as evidence of proper authority. Upon proper scrutiny, I found that this letter was actually a letter warranting the solicitors to act for the directors as well as for the first plaintiff company. Those directors were the original second, third and fourth plaintiffs but as mentioned earlier, they have since ceased to be parties to this suit. Now, in order to be effective in relation to the first plaintiff company, that warrant must be accompanied by a resolution, which at the barest minimum, is to the effect that the first plaintiff company had resolved that legal proceedings be initiated in respect of the matters or complaints in this suit. Ideally, that resolution ought to include a declaration that the directors or certain directors be authorised to liase with solicitors appointed for those legal proceedings. C D E
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> [12] By the first plaintiff's own solicitors' admission, there is no resolution by the first plaintiff company to sue these defendants and to authorise certain individuals to take the necessary actions. On that score, this case is entirely distinguishable from the factual matrix in *Yukilon* and also *William Jacks*. The want of resolution is an admitted fact and that is sufficient to deal and dispose of the objections raised by the defendants without the necessity of a formal application. F
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> [13] Mr Jayasingam had also suggested that this matter of the resolutions can always be ratified. In this respect, this is my response. It is not the concern of the court that a deficiency may be subsequently resolved or corrected by ratification. To take this approach may be somewhat presumptious of the outcome, that ratification is a certainty or a given. The converse may well result, that ratification is refused. Where the issue of want of authority is raised, and where counsel is of the opinion that ratification is the appropriate course, it is open to the solicitors to take such steps as necessary to address the objection or concern. However, it is clear that the solicitors did not think that necessary since they have offered a letter of authorisation or a warrant to act as the answer to the objections brought by the defendants. G H
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> [14] In any case, I do not think it proper to take that route in view of the recent orders made by the Court of Appeal. Those orders cannot be ignored. The directors of the first plaintiff company (the appellant) now hold their shares onjrust for Miss Lim and they cannot act in defiance of or contrary to her directions and decision. Through her counsel, she has clearly indicated that she is not interested in pursuing the present action. The court ought to take cognisance of Miss Lim's views as the majority shareholder. I

[13] The reasoning of the learned High Court judge, in brief, is that, firstly, the warrant to act is insufficient without being accompanied by the appellant's board of directors' resolution appointing Messrs Lawrence to act; and, secondly, the warrant to act, in any case, is bad in law as it was contrary to the wishes of Ms Lim the beneficial majority shareholder who had no desire in pursuing the writ action.

[14] On 20 September 2013, we unanimously allowed the appeal with costs.

[15] We now give our grounds.

[16] Firstly, it is not disputed that the appellant's solicitors, Messrs Lawrence, had the warrant to act. As the learned High Court judge had noted, a letter dated 3 December 2003 warranting the appellant's solicitors to act was produced before the learned judge by Mr Jayasingam (the counsel for the appellant at the High Court) on 12 April 2011. The letter reads:

HI-SUMMIT CONSTRUCTION SDN. BHD.

(Company No. 359897-H)

8A, Jalan 7/23E, Taman Danau Kota Setapak, 53300 Kuala Lumpur

Tel: 03-40236322 Fax: 03-40252281 H/P: 019-3043289

3rd December 2003

Messrs B H Lawrence & Co

Advocates & Solicitors,

1109

Block B

Phileo Damansara 2

46350 Petaling Jaya

Dear Sir,

Suit to be initiated by Hi-Summit Construction Sdn Bhd, Dato' Suhaimi Bin Ibrahim, Irwan Shah Bin Abdullah dan Abdul Rahmat Bin Ramli against Konsortium Lapangan Terjaya Sdn. Bhd., Ulimas Sdn. Bhd., Bright Focus Sdn. Bhd. and Anson Perdana Berhad

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We hereby confirm your warrant to act for us in respect of the above matter.

This warrant extends to you acting for us in all preliminary matters, including issue of correspondence, advice, in any ensuing litigation, including all matters

preparatory to, attendance at, and all matters incidental thereto.

We further confirm that all correspondence for the above matter should be addressed to one party only being Irwan Shah bin Abdullah @ DJ Dave who shall be our representative and whose address is at No.6-4-6, Danau Permai Condominium, Jalan 3/109F, Taman Danau Desa, 58100 Kuala Lumpur.

The fees payable to you by the Company in respect of the above shall be as negotiated and confirmed to you by the undersigned directors of the company.

Yours faithfully,

sgd	sgd
.....	.....
Irwan Shah Bin Abdullah @ DJ Dave	Dato' Suhaimi Bin Ibrahim
DIRECTOR	DIRECTOR

[17] It is also not disputed that, subsequent to the striking out of the suit by the learned judge of the High Court, there was a board resolution of the appellant company dated 12 April 2011, signed by all the three directors of the company, ratifying the appointment of Messrs Lawrence to act for the appellant and the instituting of the writ action against the respondents. The unanimous board resolution reads:

HI-SUMMIT CONSTRUCTION SDN. BHD

Company No: 359897-H

(Incorporated In Malaysia)

Pursuant to Articles 109 of the Articles of Association of the Company, we, the undersigned all the Directors for the time being of the Company do hereby RESOLVE:

RATIFICATION OF APPOINTMENT OF MESSRS B H LAWRENCE AND INSTITUTION OF THE SUIT AGAINST KUMPULAN LAPANGAN TERJAYA SDN. BHD, ULIMAS SDN. BHD, BRIGHT FOCUS SDN. BHD. AND ANSON PERDANA BERHAD.

That it is hereby resolved that the instructions of the Company and/or acts of Dato' Suhaimi Bin Ibrahim, Irwan Shah Bin Abdullah @ D.J. Dave and Abdul Rahmat Bin Ramli, being the directors of the Company be and are hereby ratified in relation to the appointment of Messrs B H Lawrence & Co. of Unit No. B11-09, Block B, Phileo Damansara 2, No. 15, Jalan 16/11, Off Jalan Damansara, 46350 Petaling Jaya, Selangor and the inception and/or institution of the Kuala Lumpur High Court suit No. D3-22-1958-2003 against Kumpulan Lapangan Terjaya Sdn. Bhd, Ulimas Sdn. Bhd, Bright Focus Sdn. Bhd. and Anson Perdana Berhad.

Dated this: 12th April, 2011

BY THE BOARD OF DIRECTORS

A

DATO' SUHAIMI BIN IBRAHIM sgd ...
IRWAN SHAH BIN ABDULLAH @ D. J. DAVE sgd ...
ABDUL RAHMAT BIN RAMLI sgd ...

B **[18]** Mr Su Tiang Joo, learned counsel for the appellant, submitted before us that the warrant to act of 3 December 2013, signed by two out of the three directors of the appellant company, was sufficient to vest the appellant's solicitors with the necessary powers to act. Mr Su relied on *Yukilon Manufacturing Sdn Bhd & Anor v Dato Wong Gek Meng & Ors* [1997] 2 MLJ C 212.

[19] To reinforce his argument, Mr Su further referred to article 116 of the appellant's articles of association that provides that 'the business of the company shall be managed by Directors'. We produce below article 116 in full:

D

General power of Directors to manage Company's business

116. The business of the company shall be managed by Directors who may exercise all such powers of the company as are not by the Act or by these presents required to be exercised by the company in general meeting, subject nevertheless to any E regulations of these presents, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions as may be prescribed by Special Resolution of the Company, but no regulation so made by the company shall invalidate any prior act of the directors which would have been valid if such regulation had not been made. The general powers given by this Article shall F not be limited or restricted by any special authority or power given to the Directors by any other Article provided that any sale of the company's main undertaking shall be subject to ratification by the members in general meeting.

[20] Mr Su also referred to articless 102 and 103 of the appellant's articles of G association. These articles provide:

Meetings of directors

102. The Directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit. Questions arising at any meeting H shall be determined by a majority of votes. In case of an equality of votes the Chairman shall not have a second or casting vote where there are two Directors present at the meeting and the resolution in question shall not be carried. A Director may, and the Secretary on the requisition of a Director shall, at any time summon a meeting of the Directors. It shall not be necessary to give notice of a meeting of I Directors to any Director for the time being absent from Malaysia.

103. The quorum necessary for the transaction of the business of the Directors may be fixed by the Directors and unless so fixed at any other number shall be two. A meeting of the Directors at which a quorum is present shall be competent to exercise all powers and discretions for the time being exercisable by the Directors.

[21] Mr Su further submitted that the authority to institute legal proceedings on a company's behalf is vested in the directors as an incident of managing the business of the company. A

[22] In our judgment, we agree with the submission of Mr Su, learned counsel for the appellant, that the warrant to act dated 3 December 2003 signed by two out of the three directors of the appellant company, and considered in the light of articles 102, 103 and 116 of the articles of association of the appellant's company, was sufficient authorisation for the commencement of the action. We agree with the decision in *Yukilon Manufacturing* wherein Abdul Malik Ishak J (as he then was) ruled (at p 220): B C

> In my judgment, the letter dated 7 December 1996 was an act of authorisation authorising or employing Messrs Gan & Lim to act on behalf of the plaintiffs.

[23] In this case cited, a preliminary objection was advanced questioning the authority of a firm of solicitors, Messrs Gan & Lim, to act for the plaintiffs. Learned counsel for the plaintiffs produced before the High Court a letter issued by the first plaintiff company and signed by two of its directors authorising Messrs Gan & Lim to act for the plaintiffs. But the defendants insisted that learned counsel for the plaintiffs must also produce a resolution of the board of directors of the first plaintiff company authorising Messrs Gan & Lim to act for the plaintiffs. The objection was dismissed by Abdul Malik Ishak J who ruled that that letter of authorisation was sufficient. D E

[24] We note that the authenticity of the warrant to act produced by Mr Jayasingam before the learned High Court judge is not disputed; nor is it disputed that there are only three directors in the appellant's board of directors, and that the warrant to act was signed by the majority of the directors. Significantly too, it must be appreciated that there was no advanced notice issued to the appellant prior to the hearing on 12 April 2011 that the respondents were going to make an oral challenge as to the appellant's solicitors' authority to act. It is, however, true that two of the respondents' solicitors (Messrs RR Sethu for the first respondent; and Messrs CH Yeoh & Yiew for the third respondent) had, prior to the hearing date, written to the appellant's solicitors. But the letters were not notices of an intention to challenge Messrs Lawrence's authority to act. They were merely seeking a copy of the appellant's board of directors' resolution authorising the appointment of the appellant's solicitors, and even then these letters dated 11 April 2011 were served on the appellant's solicitors at the 11th hour, that is to say, just a day before the hearing date of 12 April 2011. Further, it is important to note that there was no proper formal application made by the respondents before the learned High Court judge to challenge the authority of the appellant's solicitors to act; there was merely an oral challenge by the respondents' respective counsel made from the Bar. We take the view that in the circumstances, in particular, F G H I

considering the manner in which the challenge was made, and in the light of the undisputed facts, the production of the warrant to act by the appellant's counsel is sufficient answer to the challenge; and that the respondents had no right to insist that the warrant to act be accompanied by a board of directors' resolution.

[25] In *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 the Supreme Court, after reviewing several English authorities, held (at p 558):

> Then after considering the submissions of counsel regarding the challenge to the authority of the appellant's solicitors to act, we agreed with the observations of Warrington J in *Richmond v Branson & Son* that the business of the courts could not be carried out if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in a proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority.
>
> ...
>
> Although the learned judge referred to the above-quoted passage in the judgment of Slesser LJ in *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw* which, we agreed with Mr Abraham, supported the appellant's contention that a substantive motion is required, it would appear that the learned judge had overlooked the following passages in the judgments of Greer LJ and Roche LJ respectively in the same case at pp 131 and 147 respectively:
>
> > In *Russian Commercial and Industrial Bank v Comptoir dÉscompte de Mulhouse*, the court held that the evidence established that the English representative of the Russian corporation had authority to bring the action, but Lords Cave and Atkinson and Atkin LJ went beyond what was necessary to decide the case and expressed the opinion that the point of want of authority could not be raised by way of defence, but ought to be raised by notice of motion to stay or dismiss the action. These observations do not, in my judgment, mean that if the facts actually put in evidence prove that the solicitors commenced the proceedings without any authority from the named plaintiff, the court ought to ignore those facts, and give judgment in favour of or against a party who ex hypothesis is not present in court. In my opinion the court has inherent jurisdiction to say 'as it is clearly established that the action has been brought by solicitors who were not authorized by the named plaintiff to bring it, we will strike it out.' (Greer LJ)
>
> and
>
> > As to the preliminary question whether the plaintiff company was properly before the court, that is to say, whether the action was instituted and carried on with its authority, I have arrived at the same result as Greer LJ, but for different reasons, which I propose briefly to state.
> >
> > I agree with both the Lord Justices as to the result of the decided cases and particularly of the *Daimler* case and of the *Russian Commercial Bank* case. The principles to be derived from them are that such an objection to a right to sue as

> is here taken should be taken not at the trial but by an interlocutory motion or summons; that if such procedure is not adopted the court need not, and ordinarily should not, entertain such an objection at the trial as if it were a defence. If it were otherwise, then for reasons pointed out by Warrington J in *Richmond v Branson*, the position of the court would be well-nigh intolerable. Nevertheless, as appears from the decision in the *Daimler* case, if want of capacity or authority to sue plainly appears at any stage the court may then strike out the action. (Roche LJ)

> Although the various dicta in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, we would agree that a challenge to the authority of solicitors may be made at any time and the court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient or admitted evidence that there is no action properly before it. But when there is no such evidence, the court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

[26] In our judgment, in the present case, the parties orally challenging the appellant's solicitors' authority to act, that is to say, the respondents, had failed to show 'sufficient or admitted evidence' that there was no action properly before the High Court. On the contrary, the appellant's counsel was able to show that it had the warrant to act.

[27] In any event, the learned High Court judge was wrong in law in striking out the appellant's writ action even if she were of the opinion that the warrant to act was insufficient to clothe the appellant's solicitors with the requisite authority since it was not accompanied by a board of directors' resolution. For, based on the ruling in *William Jacks*, the learned High Court judge could not there and then summarily struck off the writ action but (at p 558):

> ... should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

[28] Had the learned High Court judge acted as she should, as required by the case law authorities, that is to say, to stay the proceedings and to direct the respondents to make a formal application (by motion or summons) to challenge the appellant's solicitors' authority to act, the appellant would have had the opportunity to obtain the board of directors' unanimous resolution ratifying the warrant to act. Indeed, in the present case, it is the undisputed fact that the appellant company did on 12 April 2011 (that is to say, on the day of the decision itself, but after the striking off) obtain the board of directors' unanimous resolution ratifying the warrant to act.

[29] In the light of the existence of the warrant to act and the board of director's unanimous resolution, the hue and cry raised by the respondents

before the High Court judge is nothing but a mere storm in a teacup. It was hasty, harsh and unjust for the learned High Court judge to have struck off the appellant's suit summarily merely on an oral challenge (made without advanced notice) from the bar and without giving the appellant company and its solicitors the opportunity to prove in a proper formal application by the respondents (by summons or motion) that it's solicitors had the requisite authority to act.

[30] In our judgment, upon a proper examination of the judgment in *William Jacks* and the English authorities cited and relied upon therein, we are of the view that a challenge to authority to act, as a rule, should be made only by way of a formal application (by summons or motion), and not to be made orally from the Bar. Any challenge to authority to act may be made orally from the Bar only in exceptional circumstances; and, even then, the court should be extremely slow to entertain such an oral challenge. The court should only entertain an oral challenge made from the bar where there is before the court evidence of a clear and unequivocal admission on the part of the solicitors (whose authority to act for a party is being challenged) that they have no authority to act for the party that they purport to act, or where, it is plain and obvious from the evidence before the court that the solicitors have no authority to act for a party.

[31] In the present case, we are satisfied, there is no clear and unequivocal admission by Mr Jayasingam that Messrs Lawrence had no authority to act for the appellant. On the contrary, Mr Jayasingam had maintained before the High Court that he had the authority to act and, indeed, had tendered to the court the warrant to act that we have mentioned earlier in this judgment. He even went to the extent of informing the court that the two directors (Dato' Suhaimi bin Ibrahim and Irwan Shah bin Abdullah) who had signed the warrant to act were in the process of getting a board resolution to ratify the warrant to act, if need be. With respect, we find the learned High Court judge had erred in law in equating an admission on the part of Mr Jayasingam that there was no board of directors' resolution with an admission that there was no authority to act when she said:

> The want of resolution is an admitted fact and that is sufficient to deal and dispose of the objections raised by the defendants without the necessity of a formal application.

[32] Now, in respect of Ms Lim Chew Yin's assertion that she was not interested in pursuing the appellant's action, it is to be recalled that the learned judge, in her grounds of judgment, had said:

> The directors of the first plaintiff company (the appellant) now hold their shares on trust for Miss Lim and they cannot act in defiance of or contrary to her directions

and decision. Through her counsel, she has clearly indicated that she is not interested in pursuing the present action. The court ought to take cognisance of Miss Lim's views as the majority shareholder.

[33] With respect, in our judgment, the learned judge erred in taking into account the views of Ms Lim. This is because Ms Lim was not a party to the action and, therefore, had no locus standi in the proceedings. And her views were only communicated to the court via counsel from the Bar.

[34] It is true that it is not disputed that she was a beneficial majority shareholder under a trust. But it is a principle of company law that the directors' duty is towards the company, and not the shareholder; and the directors may act contrary to the wish of a shareholder. In *Howard Smith Ltd v Ampol Petroleum Ltd and Others* (1974) 3 ALR 448, the Privy Council held (at p 457):

... it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and ... the majority of shareholders cannot control them in the exercise of these powers while they remain in office (*Automatic Self Cleansing Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34) ...

[35] Further, we do take note of the fact that Ms Lim was only a beneficial owner of the shares. She was not the registered owner. In this regard, the Federal Court in *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240 has held (at p 242):

A company does not take cognisance of trusts except in so far as is provided for in s 163 of the Companies Act 1965 which should be read in conjunction with its articles of association which usually go beyond the statutory provision by stating that the company shall not be bound to recognise any equitable interest or any other right in a share except an absolute right in the registered holder.

[36] In the case before us, article 17 of the appellant's articles of association provides:

17. Except as required by law, no person shall be recognized by the company as holding any share upon any trust, and the company shall not be bound by or compelled in any way to recognize any equitable, contingent, future or partial interest in any share; or any interest in any fractional part of a share, or (except only as by these presents, or by law otherwise provided) any other right in respect of any share, except an absolute right to the entirely thereof in the registered holder.

[37] And s 163(4) of the Companies Act 1965 provides:

(4) Except as provided in this section no notice of any trust expressed, implied or constructive shall be entered on a register or branch register or be receivable by the

Registrar and no liabilities shall be affected by anything done in pursuance of subsection (1), (2) or (3) or pursuant to the law of any other place which corresponds to this section and the corporation concerned shall not be affected with notice of any trust by anything so done.

[38] By virtue of article 17 above read with s 163(4) of the Companies Act, as at 12 April 2011, Ms Lim Chew Yin's interest in the appellant company should not and could not be recognised, and she was not in the position to exercise any rights under the shares at all.

[39] Appeal allowed with costs. The appellant's writ action reinstated.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor